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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES VANADIUM CORPORATION AND ELECTRO METALLURGICAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review that part of the judgment of the Court of Appeals for the Tenth Circuit entered on February 11, 1956, which affirmed the district court's order dismissing the information as to respondents United States Vanadium Corporation and Electro Metallurgical Company.

OPINION BELOW

The opinion of the court of appeals (App. 16–23) has not yet been reported. The opinion of the district court (R. 16–19) is reported in 132 F. Supp. 388.

JURISDICTION

The judgment of the court of appeals (App. 23) was entered on February 11, 1956. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Clark on March 5, 1956, to April 11, 1956 (App. 24). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The district court dismissed a criminal information charging violations of the Sherman Act as to certain of the corporate defendants which were merged or dissolved after the information had been filed. The criminal provisions of the Act apply to any "person," and Section 8 defines "person" as including "corporations * * * existing under * * * the laws of any State." The following questions are presented:

1. Whether a merged or dissolved corporation which, under the law of the state of incorporation, continues to exist for many purposes (even if not for purposes of state criminal prosecution), is an "existing" corporation which remains subject to criminal prosecution under the Sherman Act.

2. If the answer to question 1 depends upon whether under state law the corporation is subject to state criminal prosecution, whether, under the laws of the States of Delaware and West Virginia, criminal proceedings survive the merger or dissolution of corporate defendants.

STATUTES INVOLVED

The pertinent provisions of Sections 1, 2 and 8 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. 1, 2 and 7, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemd guilty of a misdemeanor, * * *.
>
> SEC. 8. The word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Sections 261 and 278 of the Delaware Code Annotated (Title 8, 1953) provide in pertinent part:

§ 261. EFFECT OF CONSOLIDATION OR MERGER UPON PENDING ACTIONS.

Any action or proceeding pending by or against any of the corporations consolidated or merged may be prosecuted as if such consolidation or merger had not taken place, or the corporation resulting from or surviving such consolidation or merger may be substituted in its place.

* * * * *

§ 278. CONTINUATION OF CORPORATION AFTER DISSOLUTION FOR PURPOSES OF SUIT AND WINDING UP AFFAIRS.

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of

such actions, suits or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed.

Section 3095 of the West Virginia Code (Chapter 31, 1949) provides:

§ 3095. *Effect of Dissolution or Expiration.*—When a corporation shall expire or be dissolved as prescribed in this article, its property and assets shall be subject to the payment of the corporate obligattions and the expenses of winding up its affairs, and the surplus, if any, to distribution among the stockholders according to their respective rights. The board of directors and the executive officers in office at the date of such expiration or dissolution, and their successors in office, shall have the right to fill any vacancy in any executive office and of the board of directors by appointment; and they and their successors in office may cause suits to be brought, conducted, prosecuted or defended, the real and personal property of the corporation to be conveyed or transferred under the common seal or otherwise, further assurances of previous conveyances to be made, and all lawful acts to be done, in the corporate name, in like manner and with like effect as before such dissolution or expiration; but so far only as shall be necessary or proper to do and perform every act and thing which should have been or should be done and performed by the corporation, and for collecting the debts and claims due to the corporation, converting its property and assets into money,

prosecuting, defending and protecting its rights, enforcing all claims in its favor, and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto.

STATEMENT

On September 21, 1948, the United States filed an information charging Union Carbide and Carbon Corporation, Vanadium Corporation of America, and three of the former's wholly-owned subsidiary corporations, with violating Sections 1 and 2 of the Sherman Act by combining and conspiring to fix prices and to monopolize sales of ferrovanadium and vanadium oxide (R. 3–10). Following the filing of the information, one of the subsidiaries, Electro Metallurgical Company, a West Virginia corporation, was dissolved pursuant to the laws of that state; and the other two, United States Vanadium Corporation, a Delaware corporation, and Electro Metallurgical Sales Corporation, a New York corporation, were merged with Union Carbide (R. 12–13).

On January 7, 1954, Union Carbide moved to dismiss the information as to the three subsidiaries on the ground that their merger or dissolution abated the criminal action (R. 11). The district court granted the motion (R. 16–19). It held that the law of the state of incorporation determines whether merger or dissolution abates a Sherman Act criminal proceeding, and that under

the respective laws of West Virginia, Delaware and New York, a criminal action does not survive merger or dissolution (R. 17–19).

On appeal, the Court of Appeals for the Tenth Circuit affirmed the dismissal as to the Delaware and West Virginia corporations, but reversed the dismissal as to the New York corporation (App. 23). The court held (App. 17) that the question whether a criminal action abates upon dissolution was to be determined by state law, and it concluded that under New York law a criminal action survives corporate dissolution, but that under Delaware and West Virginia law it does not. In holding that Delaware law continues corporate existence after dissolution only for civil, and not for criminal purposes, the court followed its prior decision in *United States* v. *Safeway Stores, Inc.*, 140 F. 2d 834. It recognized that the *Safeway* case was in conflict with a later decision by the Seventh Circuit (*United States* v. *P. F. Collier & Son Corp.*, 208 F. 2d 936), which held that under Delaware law a criminal proceeding does survive dissolution (App. 18), and it intimated that members of the panel might not be "in full sympathy" with *Safeway* (App. 18). Nevertheless, the court refused to reexamine *Safeway*, as the Government had requested it to do, on the ground that "one panel of the court should not lightly overrule a decision by another panel" (App. 18), and it decided to

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"adhere" to *Safeway* "until the Supreme Court has spoken" (App. 18).[1]

REASONS FOR GRANTING THE WRIT

This case presents an important matter of federal law which has not been, but should be, settled by this Court, namely, the proper standard for determining whether a pending criminal proceeding under the Sherman Act is abated by the merger or dissolution of a corporate defendant. The court below held that the action had abated as to the Delaware and West Virginia corporations because it concluded that, under the laws of those jurisdictions, *state* criminal proceedings do not survive merger or dissolution. We submit, however, that (1) the test for determining whether a Sherman Act criminal proceeding abates is not whether state criminal proceedings would survive, but whether state law continues post-dissolution corporate existence for any purpose; and (2) in any event, under Delaware and West Virginia law, a merged or dissolved corporation remains subject to criminal prosecution.

1. Sections 1 and 2 of the Sherman Act provide that any "person" who combines or conspires to restrain, or who monopolizes, interstate

[1] On the basis of the similarity between the West Virginia and Delaware statutes, the court also concluded that under West Virginia law criminal actions abate upon dissolution (App. 18–19).

commerce may be convicted of violation thereof. Section 8 defines "person" as including "corporations * * * existing under * * * the laws of any State." Thus, although Section 8 requires reference to state law to determine whether a corporation may be held criminally liable, the answer to that question depends solely on whether the corporation "exists" under that law. We believe that if state law continues corporate existence after merger or dissolution, albeit not for purposes of *state* criminal prosecution, the dissolved corporation remains an "existing" one under Section 8 and therefore continues subject to federal criminal prosecution under the Sherman Act.

Under both Delaware and West Virginia law, merged or dissolved corporations continue to exist for many purposes. Thus, Delaware provides that all corporations shall "be continued" as "bodies corporate" for three years after dissolution for purposes of prosecuting or defending litigation pending at dissolution or instituted within that period, and of "enabling them gradually to settle and close their business" (*supra,* pp. 4–5). In addition, the Delaware Code provides specifically that, in the event of merger, "any action or proceeding pending by or against" the merged corporation "may be prosecuted as if such * * * merger had not taken place." West Virginia law contains similar provisions (*supra,*

pp. 5–6). In short, "the State has elected to keep the corporation in existence, maimed but still alive," and it cannot "preserve the artificial entity for a purpose of her own and destroy it for the purpose of withdrawal from the supremacy of federal law." Mr. Justice Cardozo, dissenting in *Chicago Title and Trust Co.* v. *Wilcox Bldg. Corp.*, 302 U. S. 120, 131.[2] Cf. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 345–346.

The broad definition of "person" in Section 8 was plainly designed "to preclude any narrow interpretation" (*United States* v. *Cooper Corp.*, 312 U. S. 600, 607) of the categories of persons subject to criminal penalties for violation of the Sherman Act. We believe that Congress intended in Section 8 to provide such penalties for all cor-

[2] Justices Stone and Black joined in this dissent. The *Chicago Title* case did not decide the issue here presented. It held only that a dissolved Illinois corporation could not, after expiration of the two-year statutory period within which dissolved corporations could sue or be sued, file a petition for reorganization under Section 77B of the Bankruptcy Act. The holding is not dispositive of the question whether a pending federal criminal action is abated by dissolution of a corporate defendant which, under state laws, continues to exist thereafter for many purposes.

porations which, under state law, have any post-dissolution existence.[3]

2. The decision below, that under Delaware law a pending criminal action does not survive corporate dissolution, is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *P. F. Collier & Son, Corp.*, 208 F. 2d 936. In the *Collier* case the court, in concluding that a criminal proceeding under the Fair Labor Standards Act would lie against a Delaware corporation which had been dissolved *before* the information had been filed, held that under Delaware law a disolved corporation continues subject to criminal prosecution. A district court in the Fourth Circuit also recently reached the same conclusion in a Sherman Act criminal case. *United States* v. *Maryland State Licensed Beverage Association*, D. Md., Cr. No. 23212, Jan. 10, 1956.

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[3] Under state law generally, a Sherman Act civil action brought by the Government would not be abated by dissolution. The Government sometimes files companion civil and criminal cases under the Sherman Act based on the same violations. It would be anomalous, indeed, if the criminal action, which is designed to impose punishment for past violation, were to abate on dissolution of the defendant while the civil suit, designed to terminate violation and prevent recurrence, were to remain pending.

We submit that the Delaware statute does provide for survival of criminal proceedings against merged or dissolved corporations. Section 278 of the Delaware Code (*supra*, pp. 4–5) provides that "any action, suit, or proceeding" begun by or against a corporation before or within a period of three years after dissolution shall continue "until any judgments, orders, or decrees therein shall be fully executed." In the *Collier* case the court construed this broad language—and we think correctly—as providing for survival of "all forms of litigation, civil, criminal, bankruptcy and admiralty." 208 F. 2d at 940. Indeed, in the instant case the court of appeals intimated that members of the panel might not be "in full sympathy" with the court's prior holding in the *Safeway* case that the Delaware Code does not provide for survival of criminal proceedings, but determined to follow *Safeway* "until the Supreme Court has spoken."

Although ordinarily this Court will not review questions of state law, we believe that it should resolve this conflict between circuits as to the interpretation of an important Delaware statute which has not been construed by the Delaware courts and which plays a significant role in Federal criminal litigation. For, if the question of post-dissolution survival of Sherman Act criminal cases depends upon whether the state survival statute applies to criminal proceedings (but

see Point 1, *supra*), uncertainty will continue unless and until the present inter-circuit conflict is settled. A substantial, if not the major, number of corporate defendants in Sherman Act cases are Delaware corporations, and the answer to whether a Delaware corporation may escape Sherman Act criminal punishment by dissolution should not depend upon the circuit in which the proceeding is brought. Furthermore, the provisions of the Delaware statute are similar to those of many other states, and an authoritative ruling on the Delaware Act will be a persuasive precedent in construing the other statutes.[4] Indeed, unless resolved by this Court, the existing conflict will inevitably lead to further litigation in those circuits which have not yet passed upon the question.

3. The question of the effect of merger or dissolution upon pending Sherman Act criminal proceedings is an important and recurring one in the administration of the Act. The recent increase from $5,000 to $50,000 in the maximum

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[4] The court of appeals (App. 18–19, *infra*), finding that the law of West Virginia "[i]n many aspects * * * resembles the law of Delaware," reached the same conclusion as to the West Virginia subsidiary corporation here involved. Although the question of West Virginia law is not in itself of sufficient importance to warrant review, as presented in the context of this case we believe it should be reviewed along with the similar question arising under the law of Delaware.

fine for Sherman Act violations (Ch. 281, Public Law 135, 84th Cong., 1st Sess. (1955)) may encourage corporate defendants to evade criminal responsibility by changing their corporate structure through mergers and dissolutions. See *United States* v. *Cigarette Merchandisers Association,* 136 F. Supp. 214, 215 (S. D. N. Y.). If dissolution abates pending criminal proceedings, private treble damage litigants, whose suits would not be abated, may be denied the benefits of a judgment in the Government suit. 15 U. S. C. 16. Finally, the dismissal of certain defendants may increase the Government's problems of proof as to the remaining defendants.

The question has been before courts of appeals three times,[5] and there have been a number of district court cases where dismissal was sought following dissolution.[6] In addition, the question

[5] In addition to the case at bar and the *Safeway* case, the Court of Appeals for the Sixth Circuit has held in a Sherman Act criminal proceeding that under Delaware law criminal actions do not survive corporate dissolution. *United States* v. *Line Material Co.*, 202 F. 2d 929.

[6] *United States* v. *Cigarette Merchandisers Association*, *supra*, p. 14; *United States* v. *Maryland State Licensed Beverage Association*, *supra*, p. 11; *United States* v. *King*, W. D. Texas, San Antonio Division, No. 13147 Criminal, August 25, 1948; *United States* v. *Anchorage Retail Liquor Dealers Association*, D. Alaska, Third Div., Cr. No. 2379, Feb. 9, 1951. Cf. *United States* v. *Western Pennsylvania Sand and Gravel Association*, 114 F. Supp. 158 (W. D. Pa.) (injunction against dissolution obtained to prevent possible ouster of jurisdiction).

may arise, and indeed has arisen,[7] in criminal proceedings under other federal statutes.

CONCLUSION

The petition presents an important question of Federal law which has not been, but should be, settled by this Court, and the decision below is in conflict with that of another court of appeals. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
JOHN BODNER, JR.,
Attorneys.

APRIL 1956.

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[7] *United States* v. *P. F. Collier & Son*, *supra* (Fair Labor Standards Act); *United States* v. *Leche*, 44 F. Supp. 765 (E. D. La.) (Connally Hot Oil Act).

APPENDIX

United States Court of Appeals, Tenth Circuit

No. 5211—November Term, 1955

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES VANADIUM CORPORATION, ELECTRO METALLURGICAL COMPANY AND ELECTRO METALLURGICAL SALES CORPORATION, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(February 11, 1956)

Before HUXMAN, MURRAH and PICKETT, United States Circuit Judges

HUXMAN, *Circuit Judge.*

The sole question presented for decision is whether three subsidiary corporations against whom criminal proceedings are pending are entitled to have such criminal proceedings abated, when they thereafter are merged with a parent corporation and have surrendered their charter.

The three subsidiaries against whom criminal actions were pending at the time they were merged with their parent, the Union Carbide and Carbon Corporation, were the Electro Metallurgical Company, a West Virginia corporation, the United States Vanadium Corporation, a Dela-

ware corporation, and the Electro Metallurgical Sales Corporation, a New York corporation. Upon merger with their parent the three subsidiaries were dissolved under the laws of the state of their incorporation. The trial court decided the question in the affirmative and dismissed the criminal proceedings pending against them; the Government has appealed.

There is no conflict in the basic principles of law which must guide us in seeking the correct answer. Thus it is established without exception that at common law, upon dissolution, a corporation ceases to exist for all purposes. It can no more be sued civilly or prosecuted criminally than can a natural person who has died.[1] It is equally well established that such common law status relating to dissolved corporations has been modified and changed by statute in the various states and that under such statutes proceedings and actions as authorized thereby may be maintained against such corporations. Also well settled is the principle that in determining whether upon dissolution the life of a corporation comes to an end for all purposes or whether it remains in a state of suspended animation so to speak for the purposes of the statute, we look to the state law and its construction by the state courts.

No decisions by the courts of Delaware, West Virginia, or New York are cited and our search has failed to reveal any which would definitely and completely answer this question. In *United*

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[1] See *United States* v. *Safeway Stores, Inc.*, 140 F. 2d 834, and cases there cited.

States v. *Safeway Stores, Inc.*, 140 F. 2d 834, we held that a criminal prosecution brought against a dissolved Delaware corporation did not survive. This conclusion is supported by the Sixth Circuit in *United States* v. *Line Material Company*, 202 F. 2d 929. However, in *United States* v. *P. F. Collier and Son Corporation*, 208 F. 2d 936, the Seventh Circuit reached a contrary conclusion. In the light of these later decisions we are asked to reexamine the *Safeway* case, and in effect, are asked to overrule it. Assuming without deciding that members of this panel of the court are not in full sympathy with the law as declared in the *Safeway* case, for reasons presently stated we nonetheless adhere to the doctrine there announced. We feel that one panel of the court should not lightly overrule a decision by another panel. To do so puts the law into a state of flux, and no one can tell what the law will be until the composition of the court is determined. Since the Circuits are not in agreement as to the law of Delaware and until the Supreme Court has spoken, we adhere to the law as declared in the *Safeway* case, *supra*. Since we have reached this conclusion, nothing of value would be added if we analyzed the decisions of the three Circuits which have construed the Delaware law.

Appellee Electro Metallurgical Company was a West Virginia corporation. The law of West Virginia with respect to dissolved corporations provides with limitations that suits may be brought, conducted, prosecuted or defended, etc.,

after dissolution.[2] No decisions have been found interpreting the West Virginia dissolution law. In many aspects it resembles the law of Delaware. We find nothing therein which would require a different conclusion from that with respect to the Delaware law.

With respect to the New York subsidiary a somewhat different picture is presented. While no New York decisions are cited which have specifically passed upon the question, there are certain decisions which point the way. There was also filed with us at the time of oral argument a photostatic copy of an opinion by United States District Judge Weinfeld of the Southern District of New York, in which he held that

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[2] § 3095 (1949) provides:

"EFFECT OF DISSOLUTION OR EXPIRATION.

"When a corporation shall expire or be dissolved as prescribed in this article, its property and assets shall be subject to the payment of the corporate obligations and the expenses of winding up its affairs, * * *. The board of directors and the executive officers in office at the date of such expiration or dissolution, * * * may cause suits to be brought, conducted, prosecuted or defended, the real and personal property of the corporation to be conveyed or transferred under the common seal or otherwise, further assurances of previous conveyances to be made, and all lawful acts to be done, in the corporate name, in like manner and with like effect as before such dissolution or expiration; but so far only as shall be necessary or proper to do and perform every act and thing which should have been or should be done and performed by the corporation, and for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting, defending, and protecting its rights, enforcing all claims in its favor, and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto."

under New York law a criminal action survived the dissolution of a corporation.[3] In reaching this conclusion he relied upon Section 90 of the New York stock corporation law which provides, "The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; * * * and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party * * * shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; * * *." Attention was also called to Section 11-a of the New York general construction law which provides that "'Action' when applied to judicial proceedings, signifies an ordinary prosecution in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Actions are of two kinds: civil and criminal." From this Judge Weinfeld concluded that the word "action" in Section 90 embraced both civil and criminal proceedings. With this reasoning we agree.

But aside from statutory construction and consideration, Judge Weinfeld concluded that the

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[3] See *United States of America* v. *Cigarette Merchandisers Association, Inc., et al.*, opinion filed November 23, 1955.

clear public policy of New York with respect to dissolved or consolidated corporations included the "right of the community to vindicate any charge against the corporation for crimes it may have committed prior to dissolution."

Appellees seek to distinguish the Cigarette Merchandisers case on the ground that it was decided under Section 90 dealing with consolidations, while these cases arose under Section 87 and Section 29 of the New York Code which deal with the merger of corporations. For the decision of the question before us, this in our view is a distinction without a difference. Neither Section 85 nor Section 29 deal with what pending causes of action survive the dissolution of a corporation. Section 29 merely provides that in the event of a dissolution of a corporation for any cause or in any manner its corporate existence shall continue for the purpose of winding up its affairs, and Section 85 provides that when a certificate is filed all the property of the merged corporation vests and is held and enjoyed by the successor corporation subject to all liabilities and obligations of the merged corporation. Subsection 8 of Section 105 provides that such a corporation shall continue for the purpose of satisfying obligations and collecting assets, and that for such purposes it may sue and be sued.

The Cigarette Merchandisers case was not decided on the narrow ground that the law declared therein applied only in the case of consolidation and was not intended to cover mergers. In the statement of facts in that case it is stated that the stockholders of the "Rowe" Corporation

"voted to *merge*[4] and consolidate," and further on it is stated that under the New York law governing consolidation a merged corporation is continued for purposes of criminal prosecution.

There is, of course, a legal and technical distinction between merger and consolidation of two companies, which for some purposes may become important. However, for the purpose of answering the question presented to us, it is in our view immaterial whether there is a merger or consolidation. In the case of a merger the merged corporation is absorbed by the merging company and ceases to exist, while the merging company continues its existence. In the case of a consolidation of two companies, a new entity is created into which both of the consolidated companies are absorbed. In each instance the question is what becomes of criminal prosecutions pending against companies which now no longer exist, either as a result of a merger or of a consolidation.

We see nothing in Section 87 which leads us to conclude that with respect to liability under a pending criminal action the status of a nonexistent corporation resulting from a merger is controlled by different principles of law than is the status of such a company when it becomes extinct by consolidation.

Since the decision in the Cigarette Merchandisers case is by a federal court, it is of course not binding upon us. We, however, feel that it is a well reasoned case and that it correctly analyzes the New York law. It is our conclu-

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[4] Emphasis supplied.

sion that under New York law a criminal action pending against a corporation which is merged survives the same as in the case of its consolidation.

In *United States* v. *Electro Metallurgical Company* and in *United States* v. *United States Vanadium Corporation* the judgments are affirmed. In *United States* v. *Electro Metallurgical Sales Corporation* the judgment is reversed and the cause is remanded for proceedings in conformity with the views expressed herein.

Judgment

Fifty-eighth Day, November Term, Saturday, February 11th, 1956

Before Honorable WALTER A. HUXMAN, Honorable ALFRED P. MURRAH and Honorable JOHN C. PICKETT, Circuit Judges

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause with respect to Electro Metallurgical Company and United States Vanadium Corporation be and the same is hereby affirmed. It is further ordered that the judgment with respect to Electro Metallurgical Sales Corporation be and the same is hereby reversed and the cause remanded for further proceedings in accordance with the views expressed in the opinion of the court.

Supreme Court of the United States

No. —, October Term, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES VANADIUM CORPORATION, ELECTRO METALLURGICAL COMPANY AND ELECTRO METALLURGICAL SALES CORPORATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 11, 1956.

/S/TOM C. CLARK,
Associate Justice of the
Supreme Court of the United States.

Dated this 5th day of March 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

MAY 7 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 848

UNITED STATES OF AMERICA, Petitioner,

v.

UNITED STATES VANADIUM CORPORATION AND ELECTRO METALLURGICAL COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief for Respondent in Opposition

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THE W. H. KISTLER STAT'Y CO., DENVER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 848

UNITED STATES OF AMERICA, Petitioner,

v.

UNITED STATES VANADIUM CORPORATION AND ELECTRO METALLURGICAL COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief for Respondent in Opposition

OPINIONS BELOW

The opinion of the District Court is reported at 132 F. Supp. 388. The opinion of the Circuit Court of Appeals for the Tenth Circuit (App. p. 16, Petition) is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The question presented is whether a criminal prosecution under the Sherman Act brought against a Delaware and a West Virginia corporation which have been dissolved and merged abates as in the case of a deceased individual,

or whether the corporations remain in existence under the laws of their respective states of incorporation or otherwise so as to permit the prosecution to continue.

STATUTES INVOLVED

In addition to the statutes cited by the government (pp. 3-6, Petition), we refer to the additional pertinent provisions of the Delaware law, to-wit: Secs. 253 and 259, Delaware Code Annotated (Title 8, 1953), Appendix A.

STATEMENT

A criminal information under the Sherman Act was filed on September 21, 1948, against Union Carbide and Carbon Corporation and three of its subsidiaries, United States Vanadium Corporation, Electro Metallurgical Company and Electro Metallurgical Sales Corporation. Thereafter the three corporations were merged into the parent corporation and dissolved. The United States District Court for the District of Colorado thereupon dismissed the prosecution as against all three of the merged subsidiaries, on the ground that the dissolution of a corporation, like the death of an individual, abates a criminal prosecution, unless the law of the state under which it was created preserves its life for such prosecution. The Court held that the laws of none of the states of incorporation of the three subsidiaries preserved the corporations for purposes of criminal prosecution and dismissed the case as to the said three subsidiaries.

On appeal to the United States Court of Appeals for the Tenth Circuit that Court held that the laws of the State of New York did preserve the life of the New York corporation, Electro Metallurgical Sales Corporation, but that the laws of the states of Delaware and West Virginia did not preserve corporate life for purposes of criminal prosecution. It therefore affirmed the decision of the District Court as to United States Vanadium Corporation and Electro Metallurgical Company but reversed as to Electro Metallurgical Sales Corporation. (See our cross-

petition, No. 849, in connection with such reversal.)

REASONS WHY THE WRIT SHOULD BE DENIED

The general principles which govern this case have been long settled by the United States Supreme Court.

In *Oklahoma Natural Gas Company v. State of Oklahoma*, 273 U.S. 257, 259, 71 L.Ed. 634, Mr. Chief Justice Taft, speaking for the Court, said:

> " * * * It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. * * * To allow actions to continue would be to continue the existence of the corporation pro hac vice. But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being." (273 U.S. 259, 260, 71 L.Ed. 635, 636.)

In *Chicago Title & Trust Company, as Successor Trustee, v. Forty-one Thirty-six Wilcox Building Corporation*, 302 U.S. 120, 82 L.Ed. 147, a dissolved Illinois corporation sought to institute bankruptcy proceedings under Sec. 77B of the Bankruptcy Act more than two years after dissolution, contending that the power of the federal government over bankruptcy was constitutionally paramount over state authority to annul corporate existence. The Court cited with approval the *Oklahoma Natural Gas* case, *supra*, to the effect that the dissolution of a corporation puts an end to its existence, the result of which may be likened to the death of a natural person. The Court then said:

"How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power." Citing cases. "The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority.

"The power to take the long step of putting an end to the corporate existence of a state-created corporation without limitation, connotes the power to take the shorter one of putting an end to it with such limitations as the legislature sees fit to annex. Compare Packard v. Banton, 264 U.S. 140, 145, 68 L.Ed. 596, 608, 44 S.Ct. 257; Davis v. Massachusetts, 167 U.S. 43, 47, 42 L.Ed. 71, 72, 17 S.Ct. 731; Rippey v. Texas, 193 U.S. 504, 509, 510, 48 L.Ed. 767-769, 24 S.Ct. 516. And since the federal government is powerless to resurrect a corporation which the state has put out of existence for all purposes, the conclusion seems inevitable that if the state attach qualifications to its sentence of extinction, nothing can be added to or taken from these qualifications by federal authority." (302 U.S. 127, 128; 82 L.Ed. 152.)

The government's contention that the Sherman Act is paramount to the state corporation law and by its own power preserves the corporate life for prosecution, is identical with the argument made in the bankruptcy case, *Chicago Title & Trust Company, supra,* that the bankruptcy law of the United States was paramount to the

state corporation law. The logic which led the Court to reject that argument leads inevitably to the rejection of the government's present contention.

There remains solely the question of construction of state laws. The United States District Court and the Court of Appeals for the Tenth Circuit both found that the corporate lives of the respondents in the pending petition were not preserved by state law for the purposes of criminal prosecution. There is no direct decision of the state courts on the matter. Should the United States Supreme Court in this case find that the intention and meaning of the state statutes were that the lives of the corporations be preserved, the state courts could immediately find to the contrary, and the determination of the state courts on questions of state law are binding on all courts of the United States Government. There is grave doubt, therefore, whether questions of the meaning of state laws which will necessarily be governed by the decisions of state courts are properly the subject of certiorari to the United States Supreme Court. Moreover, on the merits, we respectfully submit that there is nothing in any of the state laws in question to indicate any intent to preserve criminal prosecutions, either state or federal, against a dissolved corporation. On the contrary, the whole theory of those laws is that of the trust fund doctrine preserving the property of the dissolved corporation for stockholders and creditors very much in the manner that the estate of a deceased person is administered.

The conflict between the circuits relied on by the government is solely as to the meaning of the Delaware statute. That is a conflict which must ultimately be resolved by the highest court of Delaware, not by the United States Supreme Court.

The wisdom of the laws under which a corporation is created is not a matter of judicial review. If the state laws under which a corporation exists lead to evasion of

federal criminal responsibility, then it is for Congress or the State Legislatures to amend their respective laws in such a way as to foreclose such evasion. The Attorney General also has available the remedy of obtaining injunctions against mergers and/or dissolutions of corporate defendants who are under an indictment for violation of a federal law. The government has sought this remedy on two occasions, succeeding in one instance[1], and failing in the other[2]. The question of the public policy of a state law is not a valid reason for the granting by this Court of a writ of certiorari.

The affidavits of good faith and business purpose of the mergers and dissolution in this case were uncontradicted.

CONCLUSION

We respectfully submit that the petition should be denied.

Respectfully submitted,
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Attorneys for Union Carbide and Carbon Corporation into which United States Vanadium Corporation and Electro Metallurgical Company have been merged.

May, 1956.

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1 *United States v. Western Pennsylvania Sand and Gravel Association*, 114 F.Supp. 153 (W.D.Pa.) (injunction against dissolution obtained to prevent possible ouster of jurisdiction).

2 *United States v. Wallace & Tiernan Company et al*, 1954 CCH Trade Cases ¶ 67,659 (injunction denied for the reason that the motion was filed after the merger had been completed).

APPENDIX A

DELAWARE CODE ANNOTATED (TITLE 8, 1953)

Sec. 253

Sec. 259

Sec. 253. Merger or Parent Corporation and Wholly Owned Subsidiary.

(a) Any corporation organized under the provisions of this chapter or existing under the laws of this State, for the purpose of carrying on any kind of business, owning all the stock of any other corporation organized under the provisions of this chapter or existing under the laws of this State, or organized under the laws of any other state of the United States, if the laws under which the other corporation is formed shall permit a merger as herein provided, may file in the office of the Secretary of State a certificate of such ownership in its name and under its corporate seal, signed by its president or a vice-president, and its secretary or treasurer or assistant secretary or assistant treasurer, and setting forth a copy of the resolution of its board of directors to merge such other corporation and to assume all of its obligations, and the date of the adoption thereof. A certified copy of the certificate shall be recorded in the office of the recorder of deeds of the county in which the principal place of business of the parent corporation is located; and if the other corporation is also a Delaware corporation and its principal place of business is located in a different county, another certified copy of the certificate shall be recorded in the office of the recorder of deeds of such other county.

(b) Upon the recording of the certificate pursuant to subsection (a) of this section, all of the estate, property, rights, privileges and franchises of such other corporation shall vest in and be held and enjoyed by such parent corporation as fully and entirely and without change or diminution as the same were before held and enjoyed by such

other corporation, and be managed and controlled by such parent corporation, and except as hereinafter in this section provided in its name, but subject to all liabilities and obligations of such other corporation and the rights of all creditors thereof. The parent corporation shall not thereby acquire power to engage in any business, or to exercise any right, privilege or franchise, of a kind which it could not lawfully engage in or exercise under the provisions of the law by or pursuant to which such parent corporation is organized. The parent corporation shall be deemed to have assumed all the liabilities and obligations of the merged corporation, and shall be liable in the same manner as if it had itself incurred such liabilities and obligations.

(c) The parent corporation may relinquish its corporate name and assume in place thereof the name of the merged corporation, by including it in a provision to that effect in the resolution of merger adopted by the directors and set forth in the certificate of ownership, and upon the filing and recording of such certificate the change of name shall be completed, with the same force and effect and subject to the same conditions and consequences as if such change had been accomplished by proceedings under the appropriate section of this chapter.

(d) Any plan of consolidation or merger which requires or contemplates any change other than those herein specifically authorized with respect to the parent corporation, shall be accomplished under the provisions of sections 251 and 252 of this title. The provisions of section 262 of this title shall not apply to any merger effected under this section.

Sec. 259. Status, Rights, Liabilities, Etc. of Constituent and Surviving Corporations Following Merger or Consolidation.

(a) When an agreement of consolidation or merger shall have been signed, acknowledged, filed and recorded, in accordance with the requirements of this subchapter,

for all purposes of the laws of this State the separate existence of all the constituent corporations, parties to said agreement, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be in accordance with the provisions of said agreement, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so consolidated or merged, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, including in the case of banks or trust companies, without any order or other action on the part of any court or otherwise, appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, trustee of estates of lunatics and in every other fiduciary capacity, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation resulting from or surviving such consolidation or merger; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the resulting or surviving corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach

to said resulting or surviving corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

(b) In the case of a merger of banks or trust companies, any party in interest shall have the right to apply to an appropriate court or tribunal for a determination as to whether the resulting corporation shall continue to serve in the same fiduciary capacity as the merged corporation, or whether a new and different fiduciary should be appointed.

FILED
APR 11 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 849

ELECTRO METALLURGICAL SALES CORPORATION, a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to United States Court of Appeals for the Tenth Circuit

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